IN THE
SUPREME COURT OF THE UNITED STATES

NO. 337

ALEX K. EASTON, d/b/a
GEORGE EASTON FURNITURE COMPANY,

Petitioner,

v.

EDWARD EARL WEIR, II, a
minor and MURIEL A. WEIR as
guardian of the property of
EDWARD EARL WEIR, II,
a minor,

Respondents.

RESPONDENTS' BRIEF

Ross H. Stanton, Jr.
Of HARRISON, GREENE,
MANN, DAVENPORT,
ROWE & STANTON
The Tenth Floor
First Federal Bldg.
St. Petersburg, Fla.
Attorneys for
Respondents

SUBJECT INDEX

	Page
Statement of the Case	1
Argument	5
Conclusion	12
Proof of Service	13

TABLE OF CASES

	Page
Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utilities Company (Penn. 1940), 60 S.Ct. 411, 309 U. S. 30 84 L.Ed 563	9,10,11
Deming v. Carlisle Packing Company (1912 Wash.), 33 S.Ct. 80, 226 U. S. 102, 57 L.Ed. 140	9
Durley v. Mayo (Fla 1956), 76 S.Ct. 806, 351 U. S. 277 100 L.Ed. 1178	7
Easton v. Weir (1966 Fla App) 188 So.2d. 1	3
Herndon v. State of Georgia (Ga. 1935), 55 S.Ct. 794, 295 U. S. 441, 79 L.Ed. 1530	8,9
Skelly Oil Company v. Phillips Petroleum Company (Okla. 1949), 70 S.Ct. 876, 339 U. S. 667, 94 L.Ed. 1194	9

STATEMENT OF THE CASE

In this brief, petitioner, Alex K. Easton, d/b/a George Easton Furniture Co., who was the plaintiff in the Sixth Judicial Circuit in and for Pinellas County, Florida, appellant in the District Court of Appeal, Second District of the State of Florida, and petitioner in the Supreme Court of Florida, will be referred to as the petitioner. Respondents, Edward E. Weir II, a minor, and Muriel A. Weir, as guardian of the property of Edward E. Weir, II, who were the defendants in the Sixth Judicial Circuit in and for Pinellas County, Florida, appellees in the District Court of Appeal, Second District of the State of Florida, and respondents in the Supreme Court of Florida, will be referred to as the respondents.

Respondents cannot accept the statement of case as contained in petitioner's petition for a writ of certiorari. The petition contains many statements of alleged testimony given by various witnesses in the trial court. It does not contain a concise statement of the case as required by this Court's rules. This obligation, thus falls upon the respondents. Respondents cannot refer to the transcript of record in this case, since a copy has not been furnished to them.

On October 21, 1958, petitioner filed a complaint in the Circuit Court in the Sixth Judicial Circuit of the State of Florida, alleging that respondents were responsible for damages to petitioner's furniture inventory stored in respondents' warehouse. A claim for loss of business and business profits

was also made.

Trial was held on March 19-22, 1962, at which time plaintiff was awarded Sixteen Thousand and no/100 ($16,000.00) Dollars in damages by a judge sitting without a jury.

Petitioner then appealed the court's decision to the District Court of Appeal, Second District of the State of Florida. The court rendered a per curiam opinion on June 10, 1966, (Re-hearing denied July 14, 1966) affirming the trial court's finding of fact. Easton v. Weir (1966 Fla App) 188 So.2d 1.

The District Court in affirming the lower court's finding of fact on the basis that there was conflict in the testimony given at the trial stated:

> "The two points on appeal concern only the issue of damages. Plaintiff contends that the trial court's inadequate award of damages requires

> a new trial on the issue of damages and that the trial court erroneously cast the burden of proof upon the plaintiff as to the issue of mitigation of damages."

Petitioner then filed a petition for writ of certiorari to the Supreme Court of Florida, on September 12, 1966. Since Florida appellate procedure requires that the District Court's opinion appealed from be in conflict with the decision of the Supreme Court or another District Court of Appeal, petitioner's inadequate petition was dismissed on motion by respondents on December 15, 1966. Rehearing was denied February 8, 1967. At this juncture, petitioner initiated the present proceedings.

ARGUMENT

DOES THE SUPREME COURT HAVE JURISDICTION SUFFICIENT TO GRANT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI?

Petitioner seeks to have this Court review a decision of the District Court of Appeal of Florida, Second District, (Certiorari denied by Supreme Court of Florida) on the ground that the court applied the wrong principle of law requiring petitioner to prove mitigation of damages suffered by him and that the trial court inadequately assessed damages in his case.

The central issue presented at the present stage of the proceedings is whether, in fact, this Court has jurisdiction to consider the matter in that a federal question has been presented. Even though petitioner is without counsel in this case, it is important to press

the question of whether or not a federal question is presented and whether or not it was properly raised in the lower court. Respondents' position is that a federal question is not raised in these proceedings and that the violation of petitioner's constitutional rights has never been raised either in the trial court, the District Court of Appeal, or the Supreme Court of Florida. In this argument, brevity would seem to be not only a virtue, but a necessity.

A review of the opinion of the Second District (188 So.2d 1) which is the subject matter of the petition to this Court, clearly indicates that petitioner's appeal to the Second District was based upon two points: (1) the inadequacy of the damages awarded by the trial court; (2) the allegation that

the trial court improperly placed the burden upon the plaintiff as to the issue of mitigation of damages. The appeal sought to review a finding of fact by the trial judge. Petitioner failed to assert that he was deprived of his constitutional rights through the improper application of law. Further, in petitioner's petition for writ of certiorari to the Supreme Court of Florida no claim of the violation of a constitutional right was asserted.

It is fundamental that the record must establish that a federal question was presented in the court whose opinion is sought to be reviewed. Durley v. Mayo (Fla 1956) 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed. 1178) Since the record before the Court clearly establishes that the question of violation of petitioner's

constitutional rights has been raised for the first time before this Court, the petition for writ of certiorari should be denied.

In Herndon v. State of Georgia, (Ga. 1935, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530), this Court speaking through Mr. Justice Sutherland stated:

* * * * * * * * * ,

> "It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation 'of the Constitution of the United States,' and that this contention was overruled. But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions pendente lite or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the state supreme court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of the state court is conclusive here. * * * (Citations omitted)

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. * * *" (Citations omitted)

* * * * * * * * * *

As pointed out above, the Second District Court of Appeal decided a question of fact applying local law. Such a determination has been held to be a decision on non-federal grounds which warrants dismissal of any petition for writ of certiorari. Deming v. Carlisle Packing Co. (1912 Wash., 33 S.Ct. 80, 226 U.S. 102, 57 L.Ed. 140; Skelly Oil Co. v. Phillips Petroleum Co., (1949 Okla., 70 S.Ct. 876, 339 U.S. 667, 94 L.Ed. 1194).

Finally in Bell Telephone Co. of Pennsylvania v. Pennsylvania Public

Utility Commission, (Penn. 1940) 60 S.Ct. 411, 309 U.S. 30, 84 L.Ed. 563), this court said:

* * * * * * * * *

"Appellant expressly disclaimed below, and also here, raising the question of confiscation. Its contentions are (1) that the Commission's order is wholly without support in the evidence and thus constitutes a denial of due process contrary to the Fourteenth Amendment; * * *

* * * * * * * * *

"As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question. * * *" (Citations omitted)

* * * * * * * * *

Thus in the case at bar, as in the Bell Telephone Co. of Penn. case, the Second District Court reviewed a trial court's determination of the evidence and facts and decided that since there was conflict in the evidence, the trial judge's ruling could not be disturbed.

CONCLUSION

The record before this Court indicates that any alleged violation of petitioner's constitutional rights is asserted for the first time in these proceedings.

Further, the determination of the sufficiency of the evidence by the Second District Court of Appeal of Florida in affirming the trial court's finding of fact is one of local law, constituting a determination of the case on a non-federal ground. Accordingly, this Court lacks jurisdiction in this case in the absence of a properly asserted federal question. The petition for writ of certiorari should be denied.

Respectfully submitted,

ROSS H. STANTON, JR.
Attorney for Respondents

PROOF OF SERVICE

I, Ross H. Stanton, Jr., attorney for EDWARD EARL WEIR, II, a minor, and MURIEL A. WEIR as guardian of the property of EDWARD EARL WEIR, II, a minor, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of Sept., 1967, I served copies of the foregoing brief to the Supreme Court of the United States on the party thereto, as follows:

On Alex K. Easton, petitioner, by mailing copy in duly addressed envelope, with first class postage prepaid.

Ross H. Stanton, Jr.
Of HARRISON, GREENE, MANN, DAVENPORT, ROWE & STANTON
The Tenth Floor
First Federal Building
St. Petersburg, Florida